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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 167

JOSEPH POMPROWITZ, A SOLE TRADER, DOING BUSINESS AS L. C. L. TRANSIT COMPANY; GEORGE A. HORMEL & COMPANY AND OSCAR MAYER & COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

STATEMENT AS TO JURISDICTION

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WISCONSIN

JOSEPH POMPROWITZ, A SOLE TRADER, DOING BUSINESS AS L. C. L. TRANSIT COMPANY, *Plaintiff;*

GEORGE A. HORMEL & COMPANY AND OSCAR MAYER & COMPANY,

Interveners,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES ON APPEAL.

In compliance with Rule 12 of the Supreme Court of the United States, as amended, plaintiff, Joseph Pomprowitz and intervening plaintiffs, George A. Hormel & Company and Oscar Mayer & Company, submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final decree and order of the United States District Court of three judges on March 17, 1954. An application for appeal was presented to the District Court on May 13, 1954.

Statutes Conferring and Cases Sustaining Jurisdiction

The jurisdiction of the Supreme Court of the United States to review by direct appeal the final decree and order

of the District Court entered in this case is conferred by Title 28, U. S. C. A. 1253, 2101(b), and 2325.

The jurisdiction of the Supreme Court to review on direct appeal, the final judgment in this case is sustained by many cases, including the following:

United States v. *Hancock Truck Lines, Inc.*, 324 U. S. 774;

Louisville & Nashville Railroad Co. v. *United States*, 242 U. S. 60;

North Carolina v. *United States*, 325 U. S. 507;

United States v. *United Smelting, Refining and Mining Co.*, 339 U. S. 186;

American Trucking Assns. v. *United States*, 326 U. S. 77;

Alabama G. S. R. Co. v. *United States*, 340 U. S. 216;

American Trucking Assns. v. *United States*, 344 U. S. 298.

Statutes Involved

Title 49, U. S. C. A. Section 309:

"Contract carriers by motor vehicle—(a) Permit to operate; carriers in bona fide operation on July 1, 1935; * * * 'grandfather' provisions:

"(1) Except as otherwise provided in this section and in section 310a of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: Provided, That, subject to section 310 of this title, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and

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has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit was made to the Commission as provided in subsection (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in subsection (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not including within the foregoing provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission. * * *"

"Application for permit; form and contents; issuance of permit; terms and conditions:

"(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 310 of this title, a permit shall be issued to any qualified applicant therefor

authorizing in whole or in part the operations covered by the application, if it appears from the application or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act; otherwise such application shall be denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 304(a)(2) and (6) of this title: Provided, however, That no terms, conditions or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit as the development of the business and the demands of the public may require. * * *"

Title U. S. C. A. 49, Section 312:

"Suspension, change, revocation and transfer of certificates, permits, and licenses:

"(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be sus-

pended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license; Provided, however, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 304(c) of this title, commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: And provided further, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 306, 309, or 311 of this title, or by virtue of the second proviso of section 306(a) of this title or temporary authority under section 310a of this title, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 311(c), 317(a), or 318(a) of this title, or with any lawful order, rule, or regulation of the Commission promulgated thereunder."

The Nature of the Case

This is an action in which the plaintiff sought to set aside a Report and Order of the Interstate Commerce Commission in a proceeding decided March 16, 1950, known as No. MC-31466 (Sub-No. 7) Joseph Pomprowitz Extension—Packing House Products. Said Report and Order is attached hereto, marked *Appendix A.*

The complaint in said action, in paragraphs numbered 4 to 16, both inclusive, thereof, sets forth that pursuant to the "grandfather" clause proceeding complainant was granted authority as a contract motor carrier, to transport "Dairy products, dairy by-products, manufactured or prepared foods, and materials and supplies and equipment used or useful in the production thereof, between various points as designated therein, under contracts with persons who operate * * * food processing businesses." That this "grandfather" authority was issued as of November 27, 1943; that said order was subsequently, June 29, 1944, modified slightly by increasing the extent of the Wisconsin territory, but no change was made in the commodity description; that, beginning with May, 1944, complainant negotiated and executed contracts with meat packers for the transportation in their behalf, of fresh meats and edible packing house products under the authority hereinabove referred to, giving him the right to transport "manufactured or prepared foods" and pursuant to the Commission's rules, filed contracts and rate schedules covering such operations, naming among other items, the fresh meats and specific packing house products which he thereby undertook to transport, and which rate schedules contained the specification of the operating authority under which such transportation services were to be performed; that the Commission was thereby specifically advised of his intention to transport said fresh meats and edible packing house products under the authority to transport "manufactured or prepared foods"; that until the Commission's decision and order of March 16, 1950, in its docket No. MC-31466 (Sub-No. 7), there was no challenge by it of the complainant's right to perform the services above referred to, pursuant to contracts and rate schedules which had been filed with and accepted by the Commission; that in reliance upon the circumstances, complainant built up a substantial volume of business by reason

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of which it was necessary for him to expand his operating personnel and expend considerable sums of money to provide additional equipment in order to move the traffic; that on several occasions prior to September 23, 1946, the Director of District No. 9 of the Commission's Bureau of Motor Carriers, Mr. W. E. Hustleby, with offices at Minneapolis, had advised the complainant and his traffic representative, Mr. Adolph E. Solie, of Madison, Wisconsin, that he felt there was some question as to whether or not "fresh meats" were embraced within the term of "manufactured or prepared foods", and a conference was held in the Commission's Field Office at Milwaukee, Wisconsin, at which the District Director and the local District Supervisor, together with representatives of complainant, were present, and at which time the complainant was advised by the representatives of the Commission through his representatives, that he could continue the transportation of fresh meats and edible packing house products, until further notice; that thereafter, said Hustleby advised complainant's representative, that the Commission had indicated informally, that packing house products fit for human consumption could be transported under the authority to transport "manufactured or prepared foods", but that this did not include the right to transport inedible packing house products, nor "fresh meats", and on December 6, 1946, said Hustleby advised the complainant's traffic representative, that unless complainant proceeded to file an application with the Commission for an unofficial interpretation as to whether or not the term "manufactured or prepared foods" also embraces fresh meats and edible packing house products, complainant would be expected to forthwith discontinue any operations which he might be performing in the transportation of those commodities; that thereafter, upon the insistence of the Commission's staff, above referred to, an application was filed with the Commission for the purpose of clarifying the

misinterpretation placed upon the terms of the authority granted to the applicant in the manner hereinbefore set forth; that the Commission denied plaintiff's application by its order dated March 16, 1950, and undertook to determine, by going back of the language in the permit, and by resorting to other terminology used for other purposes, that the words "manufactured or prepared foods" do not include fresh meats or edible packing house products. The said document dated March 16, 1950, is referred to as "Report and Order of the Commission", and is hereinbefore referred to as being included in Appendix A hereto attached; that thereafter, due proceedings were had before the Commission, seeking reconsideration by it and that in each instance complainant's petition was denied; complainant further alleged that the order of the Commission deprived complainant of his property without due process of law, and was in violation of the Fifth Amendment of the United States Constitution; that it was arbitrary, discriminatory, and beyond the jurisdiction and power of the Commission, and therefore, unlawful, and should be set aside.

That the intervening complainants joined in the complainant's averments above referred to, and further alleged that in reliance upon the authority granted to complainant as hereinbefore stated, they had built up a substantial business from their respective plants to markets served by the complainant, and that the order of the Commission sought to be set aside, operates to deprive them of these markets and the business so developed, (Paragraphs 5 and 6 of interveners' complaint); that the order of the Commission dated March 16, 1950, in said matter, MC-31466 (Sub-No. 7) is unlawful and void and beyond the power of the Commission to make, for the following reasons: In that it was arbitrary and capricious, in holding that edible packing house products and fresh meats are not "manufactured or prepared foods", and that meat packing houses are not in the food processing

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business, as those terms are used in the authority granted in said docket, (Paragraph 10, interveners' complaint).

The decision of the Interstate Commerce Commission entered on March 16, 1950, is reported in 51 MCC 543.

This action was commenced on the 10th day of October, 1951. The three-judge court of the United States District Court of the Eastern District of Wisconsin, in making its decision, in effect made the same findings of fact and conclusions of law as were prepared and submitted to it by the Commission. It denied the application for injunction to restrain the enforcement of the Commission's order of March 16, 1950, and dismissed the complaint.

Copies of the Opinion, Findings of Fact, Conclusions of law, and the Final Decree of the District Court, are attached hereto as *Appendix B.*

The Opinion of the District Court is not reported as yet.

The Questions Involved

1. May a contract motor carrier transport fresh meats and edible packing house products produced by meat packers, under a permit authorizing such carrier to transport "manufactured or prepared foods" produced by "persons who operate * * * food processing businesses"?

2. Does the Interstate Commerce Commission have statutory authority to undertake, several years after granting a permit to a contract motor carrier, to restrict the scope of the permit issued by it by holding that "manufactured or prepared foods" does not include fresh meats and edible packing house products, after the carrier has spent large sums of money and obligated himself under important contracts in reliance upon that permit?

3. Where the Interstate Commerce Commission has issued a permit to a contract motor carrier, and in reliance upon that permit, certain meat packers who operate food

processing businesses have established important markets for their fresh meats and edible packing house products, may the Commission at a long subsequent date, prohibit the transportation of fresh meats and edible packing house products by the contract motor carrier to whom such permit has been issued, on the ground that "manufactured or prepared foods" do not include fresh meats and edible packing house products?

4. May the Commission prohibit the transportation of fresh meats and packing house products under such a permit issued to such contract carrier, after it has for years accepted and approved contracts and schedules of minimum rates specifically defining therein the commodities to be transported thereunder?

5. When the evidence presented before the Commission was addressed primarily to the issue raised by the Commission as to the scope of the outstanding permit, should the court have remanded the proceeding to the Commission for further hearing to permit the taking of further testimony addressed to the other question before the Commission, as to whether additional authority should be granted to the holder of that permit, in order to permit of the transportation of the commodities here under consideration?

6. May the Commission, having issued an authority which has been in existence over a period of years, undertake to arbitrarily redefine the language used in that permit and in order to do so, go back of the permit to determine in 1950 what it meant when it granted the permit in 1944 thereby depriving the holder of the permit of property rights acquired and held by him over a period of six years?

7. The several Assignments of Errors, numbered 1 to 13, both inclusive, set forth in a separate document herein, are included herein as questions presented herewith.

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The Questions Involved Are Substantial

It is respectfully submitted that in the event the Commission is permitted to reduce or limit the extent of a motor carrier's authority, six years after the issuance of a permit, pursuant to "grandfather" proceedings, then the holder of a permit has no security in the permit, nor can he rely upon the action of the governmental agency issuing same. The basic question involved as to whether the Commission has the authority to reduce the scope of a contract motor carrier's permit, affects not only the plaintiff carrier and the intervening shippers herein, but also all carriers holding permits issued by the Commission, and all shippers making use of motor carriers facilities—both contract and common. The carrier is at the mercy of the regulatory body, after such carrier has been lulled into security by (1), the active conduct of the Commission in issuing the permit, and (2), the passive conduct of the Commission in accepting contracts and schedules of minimum rates, specifically delineating the articles proposed to be transported under that permit, and without making objection thereto, bearing in mind that he has, in the meantime spent large sums of money developing the business and incurring obligations under contracts in reliance upon the permit so issued.

Attention is called to the Statute, *Title 49 U.S.C.A.* Section 309(b), where the following words are contained:

> "The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and shall attach to it at the time of issuance and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the commission under section 304(a) (2) and

(6) of this title. Provided, however, that no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of that permit, or to add to his or its equipment and facilities, within the scope of the permit as the development of the business and the demands of the public, may require."

Title 49 U.S.C.A. Section 304(a) (2) relates to the keeping of accounts, records and reports, hours of service, and safety. Section 304(a) (6) relates to the duty of the commission to administer, execute and enforce all provisions of said chapter, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration. Neither of these two paragraphs is relevant here.

It is submitted that if the Commission can go behind the permit to determine the scope of the simple language used therein, as they have attempted to do in this case, then the words of the Statute above quoted, requiring them to define the scope of the authority in the permit, are meaningless, and a permit serves no purpose.

These questions are of importance because they apply not only to this carrier but to every other contract or common carrier to whom the Commission may have issued a permit or certificate since the enactment of the Motor Carrier Act of 1935.

The duty of the Commission is to look to the permit for meaning and not to go behind it. There is no power in the Commission to change the permit at will. This would violate the provision of Title 49 U.S.C.A. 312, allowing suspension, change, or revocation, only in the event of a willful failure to comply with the Act, of lawful orders or regulations of the Commission, or for specific conditions or limitations recited in the permit. *United States* v. *Rock Island M. Trans. Co.*, 340 U.S. 419, 435.

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There is nothing in this permit calling for interpretation of technical language or determination by a body of experts such as in a rate case. The language is plain and unambiguous. It should not be disturbed.

In *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 294:

> ". . . Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary . . ."

If the Commission intends to restrict a commodity such as "foods", it should do so in unmistakable terms, as it usually has done in the past. Clearly, the word "foods" covers "meats", unless it specifically restricts "meats" from the term. If the Commission does not, or did not intend the transportation of all 'foods', it has, or had other more restrictive language at its command.

We call attention to the case of *Matthews Extension of Operations* v. *Frozen Foods*, 48 M.C.C. 137, where authority was given to transport "frozen foods". The Commission, through Division 5, in that matter spoke of "meat" as a prepared food in the following language, at page 139:

> ". . . In the near future, it contemplates expanding its business especially in the prepared food line. It proposes to utilize the freezing and storage capacity of plants in the New York area for the preparation of frozen fish, *meat and other prepared food products* during the off season for freezing fruits and vegetables. These frozen *prepared foods* would be shipped from points of storage in the New York area to various points in the territory involved herein . . ." (Emphasis Supplied)

In *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, the court criticized the Commission for unduly particularizing the commodities which could be carried in the future.

In the case here presented, we have the anomalous situation of the trial court holding that the intervening plaintiffs are in the "food processing" business and at the same time holding that the prepared foods processed, or the prepared foods which they handle, may not be transported by the plaintiff carrier under a permit granting him the authority to transport "manufactured or prepared foods" for persons who operate "food processing" businesses.

We again submit that the questions involved in this case, are of importance, because they apply not only to this carrier but to every other contract or common motor carrier to whom the Commission may have issued a permit or a certificate, since the enactment of the Motor Carrier Act in 1935.

Respectfully Submitted,

(Signed) DINEEN, GLEASON, SHAUGHNESSY & DINEEN,

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Dated May 11th, 1954.

Note: There is attached hereto as Appendix C a complete statement of the Permit in question.

APPENDIX A

INTERSTATE COMMERCE COMMISSION

No. MC-31466 (Sub-No. 7)

JOSEPH POMPROWITZ EXTENSION—PACKING HOUSE PRODUCTS

Submitted September 20, 1948. Decided March 16, 1950.

Operation by applicant as a contract carrier by motor vehicle of described commodities, between described points in Wisconsin, Iowa, Minnesota, and Illinois, over irregular routes, found not consistent with the public interest and national transportation policy. Application denied.

Clarence M. Todd, Jr., and Adolph Solie for applicant.

S. L. Foote, S. H. Johnson, and Warren H. Wagner for interveners in support of the application.

Franklin R. Overmyer, Jack Goodman, David Axelrod, Claude J. Jasper, J. F. McGrath, P. M. Greensbert, H. C. Ahlberg, Gregory Gramling, George E. Wiard, Frank M. Coyne and Clarence Omviedt for interveners in opposition to the application.

REPORT OF THE COMMISSION

Division 5, Commissioners Lee, Rogers and Patterson by Division 5:

Exceptions were filed by applicant and interveners in support of the application to the order recommended by the examiner, and certain interveners in opposition replied.

By application filed February 14, 1947, as amended, Joseph Pomprowitz, doing business as L.C.L. Transit Company, of Green Bay, Wis., seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of meat, meat by-products, dairy products, articles distributed by meat packing houses, and materials and supplies used by, or useful to, packing houses, between Barron, Rice Lake, Superior, and Ashland, Wis., and Duluth, Minn., points

in that part of Wisconsin on and south of Wisconsin Highway 64 from Marinette to Merrill, Wis., on the east of U.S. Highway 51 from Merrill to Wausau, Wis., on and south U.S. Highway 29 from Wausau to junction of U.S. Highway 12 (near Elk Mound, Wis.) and on and south of U.S. Highway 12 from said junction to the Wisconsin-Minnesota State Line, including points in Kewaunee and Door Counties, Wis., Ottumwa, Burlington, and Keokuk, Iowa, points in Iowa in an area on and south of U.S. Highway 18 from Marquette to Garner, Iowa, on and east of U.S. Highway 69 from Garner to Des Moines, Iowa, and on and north of U.S. Highway 6 from Des Moines to Davenport, Iowa, points in Minnesota within an area on and east of U.S. Highway 169 from the Iowa-Minnesota State line to a point in the vicinity of St. Louis Park, Minn., and on and south of U.S. Highway 12 from said point to the Minnesota-Wisconsin State line, and points in Illinois on and north of U.S. Highway 36.

Oscar Mayer and Company and George A. Hormel Company, meat packing concerns, intervened in support of the application, and 22 motor carriers and 2 motor-carrier associations intervened in opposition thereto.

Applicant now holds a permit, issued pursuant to the "grandfather" clause provisions of the Interstate Commerce Act, authorizing the transportation among other things, of dairy products, dairy by-products, manufactured or prepared foods, and materials, supplies, and equipment used or useful in the production thereof, and of household goods, under contracts with persons who operate cheese and food processing businesses, within the territory sought in the instant application. He is here seeking primarily a determination of whether the phrase, "manufactured or prepared foods" as contained in his present permit includes fresh meats and the other commodities described in the application. In the event we find otherwise, he seeks authority to extend his present operations to include the transportation of such additional items.

Applicant is a class I motor-contract carrier, and has his principal headquarters at Green Bay. He maintains a terminal and repair shop at that point and terminals or

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terminal arrangements at Milwaukee and Beaver Dam, Wis., Iron Mountain, Mich., Freeport, Chicago, Madison, Monroe, and Galena, Ill., Cedar Rapids, Iowa, and South St. Paul, Minn. He owns and operates 172 pieces of equipment consisting of 3 passenger cars, 5 pick-up vehicles, 69 tractors, and 79 semi-trailers. The semi-trailers are insulated and have closed van bodies, 28 of them being mechanically refrigerated and the remainder, with the exception of 4, being capable of refrigeration by icing. Applicant does not advertise his services nor does he employ solicitors. He now has contracts with, and is providing service for 30 shippers, 7 of whom are meat packers. His service comprises (a) highway peddling or distribution for the shippers along specific routes in a more or less single direction, (b) radial peddling, which involves the transportation of the shipments to a given point where they are transferred to another vehicle for delivery to the surrounding area, and (c) territorial peddling, which is a combination of the two preceding types. In addition, he provides a so-called "dump-load" service, transporting the shipments to a transfer point and there delivering them to a local cartage company for distribution to the ultimate destinations. Applicant for sometime has been transporting fresh meats under color of his authority to transport prepared and manufactured foods.

The application is supported by several shippers engaged in the meat-packing business. One of these operates plants at Chicago, Madison, Davenport, Iowa, and Prairie du Chien, Wis. The Chicago plant is devoted to the processing of raw products which are received from Madison, Davenport, and Prairie du Chien. The Davenport plant is a hog-processing plant, and the Prairie du Chien plant is both a slaughtering and processing plant. The shipper operates 150 pieces of its own equipment in which it handles the major portion of its traffic. Applicant's service is used in the weekly delivery of its products in truckload lots from Madison to points in Michigan, and in the transportation of truckload shipments of fresh meats from Green Bay to Chicago and of fresh and cured meats from Madison to the Twin Cities area. The service is described as satis-

factory. Thus far it has not been used from Prairie du Chien to Davenport, but will be used in the future. The shipper desires to reduce its private-carrier operation if and when for-hire service can be obtained at comparable cost and to employ the service of applicant and other contract carriers within the considered territory. It asserts that insulated and refrigerated equipment with beef rails is required for its products, although it concedes that its own equipment is not completely refrigerated. In its opinion fresh meats are a prepared or processed food for the reason that the animal has to be slaughtered, its hide removed and washed, the carcass cut up and entrails removed, and the meat placed in coolers for given periods of time to reduce its temperature. There are 32 grades of beef, which have to be graded, and a great deal of skill is required in the described operations. Also, many packers cut the meat into quarters or smaller sizes, and bone and ship it in containers for use in making sausages. The shipper's primary interest in this proceeding is not for a broadening of applicant's territorial operations; but instead it seeks principally a finding that fresh meats are a manufactured or prepared food within applicant's present authority. It concedes that no need exists for additional service from Chicago as there is now ample service from that point. It uses various motor carriers in the territory under consideration, including a contract carrier whose service, however, is described as less satisfactory than applicant's. It desires that applicant be authorized to transport all types of packing house supplies from Chicago which are now transported by the shipper in its own equipment.

A packing house concern with plants at Newport, Minn., handles all classes of meat prepared in the manner described by the preceding witness, including items not intended for human consumption. It uses applicant's service on truckload and less-truckload shipments to points in Wisconsin and Michigan, and to and from Chicago. It also uses the services of other carriers to certain points, and describes such service as satisfactory. Ninety-five percent of the traffic handled by applicant is delivered to

local draymen at centrally-located points, and the latter make distribution to final destination. The shipper is interested in obtaining an interpretation of applicant's present authority that will permit him to transport fresh meats. Its representative, employed in its traffic department, expressed the opinion that the term "manufactured or prepared foods" includes fresh meats, and asserts that it is important that applicant be authorized to handle that commodity as well as other packing house products and supplies. The shipper's interest is primarily in obtaining cheaper transportation.

A meat packer with plants at Albert Lea, Minneapolis, and Faribault, Minn., and at Cedar Rapids and Chicago, ships fresh and cured meats and packing house products to points in the described territory. It makes no complaint against the presently available services, and confines its interest in this proceeding to the request for an interpretation of applicant's authority that would permit the transportation of fresh meats and other packing house products.

A meat packer at South St. Paul until recently shipped fresh meats and various packing house products to points in Iowa. The service available, however, allegedly has been so unsatisfactory that it now ships to those points from its Omaha plant. It has not used applicant's service to Iowa because of the question of whether the rates on manufactured food products are applicable to its products. Its traffic manager expressed the view that its products are included in the term "manufactured or prepared foods". It has used common carrier service extensively, some of which is described as satisfactory and some as unsatisfactory because the carriers refuse to handle fresh meats except during the winter months. Its representative could not give any assurance that it would resume its shipment from South St. Paul should the instant authority be granted. Its interest here is to obtain an interpretation of applicant's present authority that will permit him to transport fresh meats and other packing house products.

A meat packer with a plant at Austin, Minn., sells its products in Wisconsin and Iowa, using its own equipment and the service of rail and motor carriers. Applicant's

service is used to certain points other than Chicago, its rates to the latter point being described as less favorable than the rail rates. The shipper seeks an interpretation of applicant's authority that will permit him to transport fresh meats.

Wheeler Transportation Company is a motor-common carrier authorized, among other things, to transport general commodities, with exceptions, over regular routes serving certain intermediate and off-route points, including South St. Paul and Newport, (a) between Minneapolis and Fond du Lac, Wis., (b) between Abbotsford and Wausau, Wis., (c) between Eau Claire and Neenah, Wis., (d) between Green Bay and Sheboygan, Wis., (e) between Madison and Stevens Point, Wis., (f) between Green Bay and Milwaukee, and (g) between various other points in Wisconsin. It is also authorized to transport general commodities, with exceptions, over irregular routes between Minneapolis, St. Paul, South St. Paul, Invergrove, West St. Paul, Newport, North St. Paul, Columbia Heights, Robbinsdale, St. Louis Park, Hopkins, Edina, Richfield, Red Rock, McCarron Lake, Fort Snelling, and State Fair Grounds, Minn. In addition, it is authorized to transport (1) meats and packing house products in truckloads between Fond du Lac and Milwaukee and from St. Paul and South St. Paul to Wisconsin Rapids, Wis., (2) packing house products between Milwaukee and Madison, and (3) packing house products, and supplies, advertising matter, and premiums used in connection therewith, between Menasha and Neenah, Wis., on the one hand, and, on the other, points in a described area in Wisconsin. Its equipment includes 30 trailers, 18 of which are insulated refrigerator units equipped for the handling of fresh meats. It engages extensively in the transportation of fresh meats and packing house products. During January 1948 it handled 662,000 pounds of such products from the Twin Cities to Milwaukee and 159,000 pounds between the Twin Cities and Madison. About 55 percent of its eastbound tonnage consists of packing house products, averaging about 2,000,000 pounds per month to points in Wisconsin.

Olson Transportation Company is a motor-common carrier of general commodities, with exceptions, between Chi-

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cago and a described radius thereof, on the one hand, and points in Wisconsin bounded by Green Bay on the northwest and Gills Rock, Wis., on the north-east, on the other, over regular routes. It operates an excess of 50 units in the transportation of fresh meats, 6 of which are mechanically refrigerated. It serves various meat packing concerns and asserts that applicant has recently become a competitor between Green Bay and Chicago and has diverted the traffic of one of its shippers due to a difference in rates.

Clipper Transit Company is a motor-common carrier of general commodities, with exceptions between Chicago and various points in Wisconsin, over regular routes. It operates 6 mechanically refrigerated units and 20 insulated trailers suitable for the transportation of fresh meats and packing house products. It has unsuccessfully solicited shipments of fresh meats from Green Bay to Chicago.

West Shore Express, Inc., is a motor-common carrier of general commodities, with exceptions, operating between Milwaukee, Green Bay, and Sheboygan. It operates 4 units of equipment which it refrigerates by icing. It has several competitors serving the same territory, and interchanges traffic to and from off-line points with other carriers. It asserts that the territory it serves is small and does not have sufficient traffic to support an additional carrier.

The examiner found (1) that the term "manufactured or prepared foods" does not include fresh meats and packing house products, (2) that no need has been shown to warrant a grant of the requested authority, and (3) that applicant's contract-carrier status in respect of the proposed authority is questionable. He recommended that the application be denied. Interveners in support of the application on exceptions contend that applicant should be authorized to transport fresh meats and all other packing house products within its present territory in order that a complete service may be provided the meat packers. They argue that fresh meats and packing house products are manufactured or prepared foods. Applicant on exceptions restates his purpose of seeking a clarification of his present authority and not an extension of rights. He contends that the examiner

erred (1) in not finding that the commodities described in the application are contained in the term "manufactured or prepared foods", (2) in considering the question of intent with respect to the scope of the authority, and (3) in questioning his status as a contract carrier. On reply, interveners in opposition to the application urge that the examiner's conclusions be affirmed.

The principal question posed by applicant is whether the term "manufactured or prepared foods" as used in his present permit embraces packing house products generally and fresh meats in particular. In our opinion it does not. In the first place, the term in question contemplates only those food items which are fit for human consumption, and necessarily excludes, therefore, the numerous packing house products not so adapted. The term packing house products has long had a peculiar meaning of its own in the transportation industry, and has been found to include the articles listed in the appendix to the report in *Modification of Permits—Packing House Products*, 48 M.C.C. 628. While the term embraces certain "prepared foods" it does not follow that authority to transport "manufactured or prepared foods" extends to all of the articles contained in the appendix. The transportation of meat and packing house products is somewhat of a specialized type of service, in behalf of meat packing houses which in the conduct of their business process, manufacture, and distribute many articles of food. In the instant case the authority granted applicant to engage in the transportation of manufactured or prepared foods provides that the service shall be performed only for persons who operate cheese and food processing businesses. To construe such authority as authorizing the transportation of fresh meats would be unreasonable and contrary to the sense in which the term was used. Despite the preliminary processes that may be required in rendering them salable, fresh meats are not a manufactured or prepared food within the meaning of the commodity description used in applicant's authority any more than they could be considered as groceries, a proposition we rejected in *Hazelwood Extension—Packing House Products*, 49 M.C.C. 53. They may become a manufactured or prepared food only

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after they have been converted from their natural state into a different form.

Applicant cannot validly claim any basis for the alleged belief that the grant of manufactured or prepared foods authorized him to transport fresh meats. His permit was granted after protracted "grandfather" proceedings in which he specifically claimed the right to transport fresh meats and packing house products. In granting manufactured or prepared foods, the Commission, division 5, denied authority to transport fresh meats and packing house products; and in a companion application disposed of at the same time, No. MC-31466 (Sub-No. 2), it found that the requested authority to transport such commodities would not be consistent with the public interest or the national transportation policy. See *Pomorowitz Contract Carrier Application*, 28 M. C. C. 241, 43 M. C. C. 821, and 43 M. C. C. 822. Thus, if any ambiguity justifying us in examining the record which lead to the issuance of applicant's authority could be said to exist and if such record were examined it would be clear that there never was any intent in granting authority to transport manufactured or prepared foods, to grant authority to transport fresh meats and packing house products generally.

We come now to the question of whether the evidence establishes a need for a grant of authority to engage in the described transportation. In our opinion it does not. As seen, applicant concentrated the presentation of his case upon the issue already considered. As a consequence, the evidence does not establish that the needs of the supporting shippers cannot be met by existing carriers. To the contrary, it strongly suggests the conclusion that their support of the application is based upon the element of rates rather than service and that, of course, is not a proper predicate for a finding that the proposed service would be consistent with the public interest and national transportation policy. We conclude that the application should be denied.

We find that applicant has failed to establish that the proposed operations would be consistent with the public interest and the national transportation policy, and that the application should be denied.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 16th day of March, A. D. 1950

No. MC-31466 (Sub-No. 7)

Joseph Pomprowitz Extension—Packing House Products

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings a fact and conclusions thereon, which report is hereby made a part hereof;

It is ordered, That said application, be, and it is hereby, denied.

By the Commission division 5.

W. P. BERTEL,
Secretary.

(SEAL)

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 5396

JOSEPH POMPROWITZ, a Sole Trader Doing Business as L. C. L. Transit Company, *Plaintiff*,

GEORGE A. HORMEL & COMPANY and OSCAR MAYER & COMPANY, *Intervenors*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

OPINION

Before Duffy, Circuit Judge, and Stone and Tehan, District Judges

DUFFY, Circuit Judge. This is a suit to enjoin and set aside an order of the Interstate Commerce Commission

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entered March 16, 1950 (reported in 51 M. C. C. 343), in a proceeding entitled Joseph Pomprowitz Extension—Packing House Products, Docket No. MC-31466 (sub-No. 7). Plaintiff is a contract carrier operating under the authority of permits for, among other things, transportation within certain defined areas of "dairy products, dairy by-products, manufactured or prepared foods and materials, supplies and equipment used or useful in the production thereof, and household goods under contracts with persons who operate cheese and food processing businesses."

At the suggestion of the Commission, plaintiff filed an application seeking a determination whether "manufactured or prepared foods" as contained in his operating authority includes fresh meats and packing house products. In the event of an adverse decision, plaintiff sought in the alternative additional authority under ¶ 209 (b) of the Act, 49 U. S. C. A., ¶ 309 (b), to extend his present operations to include the transportation of fresh meats and packing house products. The application was supported by George A. Hormel & Company and Oscar Mayer & Company, intervening plaintiffs herein, and was opposed by 22 motor carriers and two motor carrier associations.

The application was assigned for hearing before an examiner who at that time had not been appointed pursuant to ¶ 11 of the Administrative Procedure Act, 5 U. S. C. A., ¶ 1010. At the hearing before the examiner no objections were made as to his qualifications. He thereafter recommended findings that the "grandfather" authority issued to the carrier did not authorize the transportation of fresh meats and packing house products. He also recommended that the authority which plaintiff sought in the alternative should be denied. Division 5 of the Commission considered this report and on March 16, 1950, entered its own report and order sustaining the view of the examiner. Thereafter, on November 6, 1950, the entire Commission denied petitions for reconsideration and further hearing which had been filed by plaintiff and the intervening plaintiffs. On January 15, 1951, plaintiff and the same intervenors again petitioned for reconsideration and new hearing. On March 5, 1951, the entire Commission dismissed said petitions under Rule

101(f) of the Commission's General Rules of Practice.[1] On June 25, 1951, plaintiff and on June 29, 1951, the intervening plaintiffs filed with the Commission their respective petitions requesting that the proceedings be re-opened and assigned for hearing before an examiner who had been appointed under the provisions of the Administrative Procedure Act. This action was commenced on October 10, 1951, and on December 10, 1951, the Commission denied the respective petitions filed on June 25 and June 29, 1951.

The first question for consideration is plaintiff's claim that he did not have a full and fair hearing because the examiner had not qualified under the Administrative Procedure Act. There is no suggestion that the examiner exhibited any bias or favoritism. It was not until 15 months after the date of the order and report of the Commission that plaintiff claimed for the first time that the examiner was not qualified. This was about 7 months after the record was closed. The objection came too late; it was not timely made. *United States et al.*, v. *L. A. Tucker Truck Line, Inc.* 344 U. S. 33; *Monumental Motor Tours, Inc.* v. *United States*, 3-judge court, 110 F. Supp. 929, 932.

The second point urged by plaintiff is that the order of the Commission was arbitrary and discriminatory when it determined that the term "manufactured or prepared foods" contained in plaintiff's present authority does not embrace fresh meats and packing house products.

Although the Commission did not state in its decision that the intervening plaintiffs were not in the food processing business, such a contention seems to be made before us. We think, however, there is nothing in this record to sustain such a conclusion. In fact in its decision herein the Commission said that meat packing houses "in the conduct of their business *process*, manufacture and distribute many articles of food." It has been held that the slaughtering department of a packing house performs a "processing operation" under the Fair Labor Standards

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[1] This rule provides that successive petitions based upon substantially the same grounds as a former petition which had been considered and denied will not be entertained.

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Act. *Walling* v. *Peoples Packing Co., Inc.*, 10 Cir., 132 F. 2d 236, 240. We hold that the intervening plaintiffs are in the food processing business within the meaning of that phrase as used in plaintiff's operating authority.

The Commission found that the term "manufactured or prepared foods" as used in plaintiff's permit does not embrace packing house products generally, and fresh meats in particular. The Commission stated, "Despite the preliminary processes that may be required in rendering them salable, fresh meats are not a manufactured or prepared food within the meaning of the commodity description used in applicant's authority * * *. They may become a manufactured or prepared food only after they have been converted from their natural state into a different form."

The Commission emphasized that plaintiff's permit was granted after protracted "grandfather" proceedings in which he specifically claimed the right to transport fresh meats and packing house products, and that in granting "manufactured or prepared foods" the Commission denied to plaintiff the authority to transport fresh meats and packing house products. The Commission also notes that in a companion application disposed of at the same time, it found that the requested authority by plaintiff to transport such commodities would not be consistent with the public interest or the national transportation policy. The commission then concluded that there never was any intent to grant authority to plaintiff to transport fresh meats and packing house products generally when it granted plaintiff authority to transport manufactured or prepared foods.

Plaintiff argues that the words "fresh meats and packing house products" are not ambiguous and urges that neither the Commission nor this court has the right to go back of the permit itself to determine the meaning or the proper application of those words. Plaintiff insists that fresh meat is a processed or a prepared food obtained by the slaughter of live animals, after which it is necessary to remove hides, hoofs, and entrails, to wash the meat, and then to cut same into desirable and useful sizes.

We concede the words "fresh meat" are not ambiguous but we think that the words "manufactured or prepared foods" as used in the plaintiff's authority are uncertain in their meaning. It is well settled that where the language contained in a permit or a certificate is ambiguous, the Commission may interpret such language whenever it becomes necessary to define the exact limits of the carrier's authority and the court will give great weight to such interpretation unless it is clearly erroneous or arbitrary.

In *Dart Transit Co.* v. *Interstate Commerce Commission, et al.*, 3-judge court, 110 F. Supp. 876, in sustaining the powers of the Commission to interpret the permit, the court stated, "It is our opinion that in an action such as this, a court may not substitute its judgment for that of the Commission with respect to the question of the scope or coverage of a permit which the Commission has issued to a motor carrier, if that question is at all doubtful. In *Noble* v. *United States*, 319 U.S. 88, 93, * * * the Supreme Court said, 'The precise delineation of an enterprise which seeks the protection of the "grandfather" clause has been reserved to the Commission.' By the same token we think that within reasonable limits it is for the Commission to determine the scope of the 'delineation.' "

"The Commission's construction of its certificates, unless clearly wrong or arbitrary, is to be accepted by the courts." *United Truck Lines, Inc.* v. *Interstate Commerce Commission*, 189 F. 2d 816, 817. "At best, the Commission's order is ambiguous. So regarding it, its interpretation is for the Commission; and the courts cannot disregard such an interpretation in those circumstances unless it is clearly erroneous or arbitrary, and the interpretation here is not." *Adirondack Transit Lines, Inc.* v. *United States, et al.*, 59 F. Supp. 503, 504, affirmed 324 U.S. 824. Our scope of review is limited. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286-287.

In determining whether Pomprowitz was authorized to

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transport fresh meats and packing house products, the Commission had the right to give consideration to the fact that in plaintiff's "grandfather" proceeding of February, 1936, he was unable to show that during the requisite period he was engaged in the transportation of fresh meats and packing house products, and that he was likewise unable to prove that during that period he had served any packing house. The Commission also had the right to give consideration to the plaintiff's companion application to the 1936 proceeding in which he sought new authority to transport fresh meats and packing house products, which application was denied at the time he was granted authority to transport manufactured or prepared foods.

We have considered the request of plaintiff and intervenors that we remand this case to the Commission for further hearing on plaintiff's request for additional authority to extend their present operations to include transportation of fresh meats and packing house products. While it is undoubtedly true that plaintiff's principal endeavor at the hearing before the Commission was on the interpretation of his present authority, he apparently had a full opportunity to make such showing as he could on his alternative proposal for additional authority. We hold that the request to remand must be denied.

We hold that the Commission's interpretation of plaintiff's authority was neither arbitrary, capricious, nor clearly erroneous. We conclude there was a sufficient factual and legal basis for the Commission's challenged order. The complaint seeking an injunction to restrain the Commission's order of March 16, 1950, is dismissed.

Dated at Milwaukee, Wisconsin this 17 day of March, A. D. 1954.

(S.) F. Ryan Duffy,
U. S. Circuit Judge.
(S.) Patrick T. Stone,
U. S. District Judge.
(S.) Robert E. Tehan,
U. S. District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 5396

JOSEPH POMPROWITZ, a Sole Trader Doing Business as L. C. L. Transit Company, *Plaintiff*,

and

GEO. A. HORMEL & COMPANY and OSCAR MAYER & COMPANY, *Intervening Plaintiffs*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

The Court makes the following findings of fact:

1. Plaintiff Pomprowitz is a contract carrier by motor vehicle in interstate commerce operating under authority of a permit granted by the Interstate Commerce Commission on November 27, 1943, following extensive hearings on a "grandfather" application filed under the provisions of Section 209 (a) of the Interstate Commerce Act (49 U.S.C. Sec. 309 (a). Under the authority granted, the carrier was authorized to transport, insofar as pertinent here, dairy products, dairy by-products, manufactured or prepared foods, and material, supplies and equipment used or useful in the production of such commodities, and of household goods, under contracts with persons or companies who operate cheese and food processing businesses, within certain portions of Wisconsin, Minnesota, Iowa, and Illinois.

2. On February 14, 1947, the plaintiff motor carrier filed an application with the Commission seeking a determination of whether the phrase "manufactured or prepared foods," as contained in his aforesaid operating authority,

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includes fresh meats and packing-house products. In the event the Commission found otherwise the carrier sought additional authority under Section 209 (b) of the Act (49 U. S. C. Sec. 309 (b) to extend his present operations to include the transportation of fresh meats and packinghouse products. The application, which was supported by Geo. A. Hormel & Company and Oscar Mayer & Company, intervening plaintiffs herein, and opposed by 22 motor carriers and 2 motor carrier associations, was primarily for the purpose of obtaining an interpretation of the commodity description of the carrier's operating authority granted under the "grandfather" clause of Section 209 (a) of the Act (49 U. S. C. 309 (a)).

3. The application was assigned for hearing before a Commission examiner who was not at the time a hearing examiner appointed pursuant to the provisions of Section 11 of the Administrative Procedure Act (Title 5 U. S. C. Section 1010), but who was a duly appointed and qualified examiner under the Interstate Commerce Act. No objection was made to the qualifications of the examiner at the time of the hearings nor on exceptions filed by plaintiffs to the examiner's proposed report and order recommending findings that the "grandfather" authority issued to the carrier does not authorize the transportation of fresh meats and packing-house products. Division 5 of the Commission considered this report and on March 16, 1950, entered a report of its own containing findings of fact and the conclusion that the commodity description in the authority granted to the carrier to transport "manufactured or prepared foods" does not embrace fresh meats and packinghouse products. Petitions for reconsideration and further hearings filed by plaintiffs were denied by the entire Commission and additional petitions filed by plaintiffs for reconsideration and further hearings were dismissed by the Commission as being successive petitions based on the same grounds as a former petition which is prohibited by the Commissions' General Rules of Practice. In none of these petitions did plaintiffs raise any objections to the qualifications of the examiner who heard the application. Plaintiffs did not raise any objection to the qualifications of the

examiner until June 28, 1951, which was more than three years after the hearing before the examiner and approximately seven months after the plaintiff's petition for reconsideration of Division 5's report and order had been denied by the entire Commission.

4. The plaintiffs have not been prejudiced in any way by the conduct or manner of appointment of the examiner and there is no suggestion that he exhibited any bias, favoritism, or unfairness. Moreover, the Commission did not institute the proceedings and the examiner did not act, and was not expected to act, both as prosecutor and judge and neither did the Commission which appointed him nor the examiner exercise any function except to decide justly the issues raised in the Commission proceedings. Plaintiffs do not claim to have been misled or in any way hampered in ascertaining the facts about the examiner's appointment.

5. The Commission has found that plaintiff carrier was granted a permit after protracted "grandfather" proceedings in which he had failed to prove that he was engaged on and since July 1, 1935, in transportation of fresh meats and packing-house products, and that it had never intended to grant him authority to transport such commodities, and that the commodity description contained in his present permit to transport manufactured or prepared foods under contracts with persons who operate cheese and food processing businesses does not authorize the transporation of fresh meats or packing-house products, and also that the carrier had failed to prove that the institution of a new service in the transportation of these commodities, under Section 209 (b) (49 U. S. C. 309 (b)), would be consistent with the public interest and national transportation policy. The Commission has further found that fresh meats are not a manufactured or prepared foods within the meaning of the commodity description used in the authority granted to the carrier.

6. The Court adopts as its own the foregoing findings made by the Commission as shown in its report of March 16, 1950.

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Conclusions of Law

And the court sets forth the following as its conclusions of law:

1. The Commission had jurisdiction to hear and determine the issues involved in the proceedings which resulted in the order here under attack.

2. Due to the failure of plaintiffs timely to object to the qualifications of the examiner they cannot now be heard to complain as to his alleged lack of qualifications or that they were denied a fair hearing.

3. The plaintiffs were accorded a full, fair and legal hearing by the Commission.

4. Interpretation of plaintiff Pomprowitz's contract carrier permit is primarily a function for the Commission to perform, and its interpretation will not be disturbed by the Court unless clearly wrong or arbitrary which is not true in the instant case.

5. The findings made by the Commission, as set forth in its report of March 16, 1950, are supported by substantial evidence of record and are adequate to support the conclusion made by the Commission.

6. The order of the Commission entered in this cause denying plaintiffs' application is a legal and valid order.

7. The injunction prayed for by plaintiffs should be denied and the suit should be dismissed.

F. Ryan Duffy,
United States Circuit Judge,
Seventh Circuit.

Robert E. Tehan,
United States District Judge,
Eastern District of Wisconsin.

Patrick T. Stone,
United States District Judge,
Western District of Wisconsin.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 5396

JOSEPH POMPROWITZ, a Sole Trader, Doing Business as L. C. L. Transit Company, *Plaintiff*,

and

GEO. A. HORMEL & COMPANY and OSCAR MAYER & COMPANY, *Intervening Plaintiffs*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

DECREE

This cause coming on to be heard before the undersigned, constituting a special District Court of three judges convened pursuant to 28 U. S. C. A. 2484(1), and 2325, upon an application for an interlocutory injunction; and being heard upon the evidence introduced before the Interstate Commerce Commission and the reports and orders of the Commission, as well as upon the arguments and briefs of counsel; and the cause, by consent of the parties, having been submitted for final decree; and the Court having made its findings of fact and conclusions of law which are filed herewith:

Now, therefore, upon the basis of such findings of fact and conclusions of law, and for the reasons set forth in the opinion of the Court herewith filed, it is ordered, adjudged and decreed that the injunction and other relief prayed for in the complaint be denied and that the suit be dismissed.

This the 17 day of March, 1954.

F. RYAN DUFFY,
United States Circuit Judge,
Seventh Circuit;

ROBERT E. TEHAN,
United States District Judge,
Eastern District of Wisconsin;

PATRICK T. STONE,
United States District Judge,
Western District of Wisconsin.

APPENDIX C

PERMIT

P-37

No. MC 31466 *

JOSEPH POMPROWITZ, Doing Business as L. C. L. Transit Company, Green Bay, Wisconsin

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 23rd day of February, A. D., 1949

After Due Investigation, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

It is ordered, That the said carrier be, and it is hereby, granted this Permit, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be attached to the exercise of the privileges herein granted, to engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce, under special and individual contracts or agreements, for the transportation of:

REGULAR ROUTES:

Canned goods,

Between Belvidere, Ill., and Minneapolis, Minn.:

From Belvidere to Minneapolis as specified below, and return over the same routes to Belvidere.

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* This permit covers the authority granted in the permit issued in this proceeding on December 11, 1945, in MC 31466 (BMC 10) on August 9, 1944, including the consolidations noted thereon, as modified by the order of December 1, 1948 in MC 31466 (BMC 10).

And with persons (as defined in Section 203(a) of the Interstate Commerce Act) who operate meat packing houses, the business of which is the processing, manufacture, and sale of packing house products, of the commodities indicated and in the manner specified below:

Packing house products and *supplies for packing houses,*

Between Minneapolis, Minn., and Chicago, Ill., and Milwaukee, Wis.:

From Minneapolis over U. S. Highway 12 via Fairchild, Wis., to Madison, Wis., and thence over U. S. Highway 14 via Janesville, Wis., to Chicago;

From Minneapolis to Madison as specified above, thence over U. S. Highway 18 to Milwaukee, Wis., and thence over U. S. Highway 41 to Chicago;

From Minneapolis to Madison as specified above, thence over U. S. Highway 151 to junction Wisconsin Highway 19, thence over Wisconsin Highway 19 to junction U. S. Highway 16, thence over U. S. Highway 16 to Milwaukee, and thence over U. S. Highway 41 to Chicago;

From Minneapolis over U. S. Highway 169 via Mankato, Minn., to Blue Earth, Minn., and thence over U. S. Highway 16 via Albert Lea, Minn., to Milwaukee;

From Minneapolis over U. S. Highway 65 to Albert Lea, Minn., thence to Milwaukee as specified above;

From Minneapolis over city streets to St. Paul, Minn., thence over Minnesota Highway 56 to junction Minnesota Highway 55, thence over Minnesota Highway 55 to Hastings, Minn., thence over U. S. Highway 61 to La Crosse, Wis., and thence over U. S. Highway 16 to Milwaukee;

From Minneapolis to Mankato as specified above, thence over U. S. Highway 14 via Owatonna, and Winona, Minn., and Madison, Wis., to Chicago;

From Minneapolis to Owatonna as specified above, thence over U. S. Highway 218 via Waterloo, Iowa, to Cedar Rapids, Iowa, and thence over U. S. Highway 30 to junction unnumbered highway, thence over unnumbered highway via Emerson, Ill., to junction U. S. Highway 330, thence over U. S. Highway 330 via Dixon, Ill., to Chicago;

From Minneapolis to Waterloo, Iowa, as specified above, thence over U. S. Highway 20 via Belvidere, Ill., to Chicago;

From Minneapolis to Fairchild, Wis., as specified above, thence over U. S. Highway 10 to Fremont, Wis., thence over Wisconsin Highway 110 to Oshkosh, Wis., and thence over U. S. Highway 41 to Milwaukee;

From Minneapolis to Janesville, Wis., as specified above, thence over U. S. Highway 51 to Rockford, Ill., and thence over U. S. Highway 20 to Chicago; and

Return over the above-specified routes to Minneapolis.

Service is authorized to and from the intermediate and off-route points of Mankato, Albert Lea, Winona, Owatonna, St. Paul, South St. Paul, Newport, and Fairmont, Minn.; La Crosse, Madison, Milwaukee, Janesville, Cudahy, Racine, and Kenosha, Wis., and Rockford and Waukegan, Ill., without restriction, and Fairchild, Wis., Dixon, Ill., and Waterloo, Iowa, restricted to pick-up or delivery of packing house products and supplies for packing houses.

IRREGULAR ROUTES:

Automobile tires, oils, and *greases,*

Between Chicago, Ill. on the one hand, and, on the other, Milwaukee, Green Bay, Fond du Lac, Oshkosh, Neenah, Appleton, Menasha, Kaukauna, New London, Clintonville, Marion, Wausau, Shawano, Bonduel, Pulaski, Antigo, Seymour, Shiocton, Blackcreek, Manawa, Port Washington, Sheboygan, Manitowoc, Two Rivers, Kewaunee, Sturgeon Bay, Algoma, Casco, New Franken, Plymouth, Kiel, New Holstein, Chilton, Hilbert, Greenleaf, Suamico, Abrams, Pensaukee, Oconto, Marinette, Crivitz, Coleman, Pound, and Lena, Wis.

Cheese,

From Algoma, Appleton, Blue River, Cleveland, Edgar, Fond du Lac, Green Bay, Juneau, Manitowoc, Marathon, Marinette, Marchfield, Platteville, Plymouth, Reedsville, Richland Center, Sawyer, Seymour, Sherwood, Spring Green, Two Rivers, and Zachow, Wis., to Milwaukee, Wis.,

with no transportation for compensation on return except as otherwise authorized.

And with persons (as defined in section 203 (a) of the Interstate Commerce Act) who operate meat packing houses, the business of which is the processing, manufacture, and sale of packing house products, for the transportation of the commodities indicated and in the manner specified below:

Such merchandise as is dealt in by meat-packing plants, and *supplies, materials,* and *equipment* used or useful in such plants,

Between Milwaukee and Cudahy, Wis., on the one hand, and, on the other, Florence, and Niagara, Wis., and points and places in Iron, Ashland, Price, Oneida, Lincoln, and Taylor Counties, Wis., and those in the Upper Peninsula of Michigan.

And with persons (as defined in section 203 (a) of the Interstate Commerce Act) who operate wholesale grocery houses, the business of which is the sale of food, for the transportation of the commodities indicated and in the manner specified below :

Such merchandise as is dealt in by wholesale food business houses, and in connection therewith, *equipment, materials,* and *supplies* used in the conduct of such business,

Between Chicago, Ill., on the one hand, and, on the other, points and places in Wisconsin.

And with persons (as defined in section 203 (a) of the Interstate Commerce Act) who operate food canneries or meat-packing houses, the business of which is the sale of the commodities described below for the transportation of the commodities indicated and in the manner specified below:

Canned foods,

From Blue Island, Ill., to St. Paul, South St. Paul, Minneapolis, and Minnesota Transfer, Minn.

From South St. Paul to Grand Forks, N. Dak., Chicago and Rockford, Ill., and points and places in that part of Wisconsin on and east of a line beginning at the junction

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of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, and extending along the Mississippi River to La Crosse, Wis., thence along U. S. Highway 53 to Cameron and on and south of a line beginning at Cameron and extending along U. S. Highway 8 to the Wisconsin-Michigan State line.

From Chicago to St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minn., and La Crosse, Wis.

Fresh meats, dairy products, and *packing house products* and *supplies.*

From South St. Paul to Grand Forks, N. Dak., Chicago and Rockford, Ill., and points and places in the Wisconsin Territory specified above.

From Chicago to St. Paul, Minneapolis, South St. Paul, Winona and Rochester, Minn., and La Crosse, Wis.

Return, with no transportation for compensation except as otherwise authorized to the above-specified origin points.

And with persons (as defined in section 203 (a) of the Interstate Commerce Act) (1) who operate meat packing houses and (2) cheese processing businesses, for the transportation of the commodities indicated and in the manner specified below:

Fresh meats, canned foods, dairy products, and *packing house products and supplies.*

From South St. Paul, Minnn., to points and places in that part of Illinois on and north of U. S. Highway 6, except Chicago and Rockford, Ill., with no transportation for compensation on return except as otherwise authorized.

Dairy and similar food products and supplies,

Between points and places in that part of Minnesota, on, south and east of U. S. Highway 8 and on and east of U. S. Highway 169, including Columbia Heights, Robbinsdale, St. Louis Park and Hopkins, Minn., in the so-called Twin Cities area, those in that part of Wisconsin, on and south of U. S. Highway 8, and those in that part of Illinois, on and north of U. S. Highway 6.

With persons (as defined in Section 203 (a) of the Interstate Commerce Act) who operate vegetable canning busi-

nesses, for the transportation of the commodities indicated and in the manner specified below:

Canned foods, materials and *supplies* and *equipment* used or useful in vegetable canning businesses,

Between Durand, River Falls, and Cumberland, Wis., Duluth, Minn., points and places in Wisconsin within a territory on and south of Wisconsin Highway 54 and on and east of U. S. Highway 51, those in Minnesota within a territory on and east of U. S. Highway 169, on and south of Minnesota Highway 36, and on and north of U. S. Highway 14, those within a territory in Iowa on and east of U. S. Highway 69, on and north of Iowa Highway 92, and U. S. Highway 67, and on and south of U. S. Highway 18, and points and places within a territory in Illinois on and north of U. S. Highway 36.

Vegetable canning machinery,

From Muscatine, Iowa and Chicago, Ill., to Oostburg, Eden, Mount Calvary, and Plymouth, Wis., with no transportation for compensation on return except as otherwise authorized.

And with persons (as defined in Section 203 (a) of the Interstate Commerce Act) who operate businesses for the manufacture, sale and distribution of general merchandise direct to consumers, for the transportation of the commodities indicated and in the manner specified below:

Such commodities, as are dealt in by the persons specified immediately above.

From Freeport, Ill., to Dubuque, Iowa, and Minneapolis, Minn.

Printers' rollers, spices, paper boxes and cartons, and *returned or rejected shipments,*

From Minneapolis, Minn., to Freeport, Ill.

Return, with no transportation for compensation except as otherwise authorized, to Freeport and Minneapolis.

And with persons (as defined in Section 203 (a) of the Interstate Commerce Act) who operate cheese and food

processing businesses, for the transportation of the commodities indicated and in the manner specified below:

Dairy products, dairy by-products, manufactured or prepared foods, and *materials, supplies* and *equipment,* used or useful in the production thereof, and *household goods* as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467,

Between St. Louis, Mo., Barron, Rice Lake, Superior, and Ashland, Wis., and Duluth, Minn., points and places in that part of Wisconsin on and south of Wisconsin Highway 64 from Marinette to Merrill, on and east of U. S. Highway 51 from Merrill to Wausau, on and south of Wisconsin Highway 29 from Wausau to junction of U. S. Highway 12 near Elk Mount, and on and south of U. S. Highway 12 from that junction to Wisconsin-Minnesota State line, including points and places in Kewaunee and Door Counties, Wis., points and places in that part of Minnesota on and east of U. S. Highway 169 and on and south of U. S. Highway 12, Ottumwa, Burlington, and Keokuk, Iowa, points and places in that part of Iowa on and south of U. S. Highway 18 from Marquette to Garner, on and east of U. S. Highway 69 from Garner to Des Moines, and on and north of U. S. Highway 6 from Des Moines to Davenport, points and places in Illinois on and north of U. S. Highway 36, points and places in Indiana, and points and places in Michigan except those in that part of the Lower Peninsula of Michigan north of the northern boundary of Muskegon, Kent, Montcalm, Gratiot, Midland, Gladwin, Arenac, and Iosco Counties.

It is further ordered, That this permit shall be effective from the date hereof, and shall remain in effect until suspended, changed, or revoked as provided in said Act.

And it is further ordered, That this permit shall supersede the permit issued in this proceeding and in MC 31466 (BMC 10) on December 11, 1945, and August 9, 1944, respectively, which are hereby canceled.

By the Commission, division 5.

W. P. Bartel,
Secretary. (Seal)

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